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Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, ET AL.,

Petitioners,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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I.

Despite respondent's efforts [1] (Respondent's brief, pp. 2, 3, 5) to becloud the state of the record showing its presence in the Southern District of New York and its absence

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[1] For instance, while the headquarters of its huge shipbuilding business is located at 25 Broadway, respondent misleadingly says at page 3 of its brief "that it has some office furniture and records in the Southern District of New York."

from the District of Delaware, we submit that the following considerations stand out:

1. Service of process was regular on its face.[2]

2. The subject-matter of the suit being within the court's jurisdiction, the marshal's return of service of process made out a prima facie case for the exercise of jurisdiction and the burden was on respondent to allege and prove facts to support its dilatory defense under the venue statute.[3]

3. Respondent offered no facts, instead relying on the proposition that as a matter of law, no corporation incorporated in Delaware could be an inhabitant of the Southern District of New York within the meaning of the venue statute (R. 49-50).

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[2] The supplemental subpoena (R. 47) authorized by the court (R. 7) was served on respondent by the marshal by delivering a copy personally (R. 48) to the designated agent at the designated office (R. 57, 77, 79, 81).

[3] The incidence of the burden of proof was clarified by the Rules of Civil Procedure, under which no allegation regarding the residence of the parties is necessary (Rule 8a) and which place the venue exemption among defenses in law or fact (Rule 12b[3]).

Petitioners' reply brief in the District Court, referred to by respondent at page 3 of its brief, was not served until five days after the argument. At the argument the record of fact was closed. Petitioners' affidavit (R. 54-55), asserting that respondent's main office is located at 25 Broadway in the Southern District of New York, was served on respondent pursuant to the requirement contained in its order to show cause (R. 50) three days before the return day (R. 49) of the order and two weeks before respondent's motion was argued (R. 2).

4. If that proposition of law is correct, which petitioners dispute, respondent's actual presence in the Southern District of New York and absence from Delaware is immaterial.

5. If that proposition of law is incorrect; then the following undisputed facts (R. 55) are decisive:

> At 25 Broadway, New York City, in the Southern District of New York, Bethlehem has a permanent office at which it regularly transacts its business; and Bethlehem is permanently present in the Southern District of New York for the conduct of its corporate business. In addition to being its chief business office, said office at 25 Broadway is in a factual sense the corporate domicile of Bethlehem, since at that place and at no other place, the Board of Directors of Bethlehem meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept.
>
> Bethlehem, in a factual sense, is not present in the State of Delaware. Its statutory office is a mere nominal one, consisting of a listing with the Corporation Trust Company. Bethlehem has no plants or other property of a substantial and permanent nature in Delaware.

Furthermore,

> Bethlehem since prior to the commencement of this suit has been the owner of substantial[4] drydock

[4] The balance sheet of United Shipyards, Inc. as of December 31, 1937, made a part of the bill by paragraph "59" (R. 35, 36) but inadvertently admitted from the transcript, shows a valuation for drydocks of $7,006,129.70 before depreciation.

properties in the waters of New York Harbor (R. 14, 15, 17, 43, 42, 32), within the jurisdictional limits of the Southern District of New York (Judicial Code 97, 28 U. S. C. A. 178). As the Circuit Court of Appeals stated (R. 86):

> "The action was originally brought by the appellants, who are citizens and residents of New Jersey, against United Shipyards, Inc., a New York corporation of which they are stockholders, to restrain the carrying out by the latter of a contract for the sale of *drydocks in the waters of New York Harbor* and other property to Bethlehem Shipbuilding Corporation, Ltd.,"[5]

II.

Respondent's argument does not meet petitioners' proposition that under the rule of *Bank of Augusta* v. *Earle*, reiterated time and again by this Court, a corporation can have no legal existence outside of the state in which it is incorporated and therefore cannot, without its consent, be sued *in personam* by any plaintiff on any cause of action in any court outside of that state, while if that doctrine is no longer authoritative, the *Shaw* case, expressly relying on *Bank of Augusta* v. *Earle* for its holding that a corporation can have no inhabitancy outside of the state of its incorporation, is no longer controlling, and the same must be true of the *Keasbey & Mattison*, *Macon Grocery* and *Seaboard Rice Milling* cases.

At page 26 of its brief, respondent asserts that a corporation incorporated in one state is subject to suit *in personam* in other states where it does business without its consent. No

[5] Emphasis in quotations added.

authority is offered for that statement and it is clearly inconsistent with *Lafayette Ins. Co.* v. *French* (1856) 18 How. 404, 407-408; *Railroad Co.* v. *Harris* (1871) 12 Wall. 65, 81; *Ex parte Schollenberger* (1878) 96 U. S. 369, 376-378; *St. Clair* v. *Cox* (1882) 106 U. S. 350, 356-357; *New England Mut. L. Ins. Co.* v. *Woodworth* (1884) 111 U. S. 138, 144-145 and *In re Louisville Underwriters* (1890) 134 U. S. 488, 493; as well as *Gibbs* v. *Queen Ins. Co.* (1875) 63 N. Y. 114, 128-129 and *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592, 598-599. And while multiplying authorities (Respondent's brief, pp. 9-10) for the proposition that a corporation incorporated in one state which does business in another state does not thereby (and implicitly, without more) become an inhabitant of such other state, respondent nowhere denies that the decisions of this Court on that subject all rely for their reasoning on the *Shaw* case and that the *Shaw* case was directly based on *Bank of Augusta* v. *Earle*.

If the doctrine of *Bank of Augusta* v. *Earle* was considered authoritative in New York in 1892 when New York passed the statute under which respondent filed its designation in 1917, such designation, to be effective for the purpose intended by the Legislature, must be construed as a consent to be sued.[6] If on the other hand the doctrine is not authoritative, respondent's main headquarters in the Southern District of New York should, we submit, lead to a holding that respondent is an inhabitant of that district within the meaning of the venue statute. As pointed out in petitioners'

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[6] The language of the designation, stressed by respondent at page 29 of its brief, is to be read not alone, but with the statutes expressing the intention of the state in requiring its filing (*Bagdon* v. *Phila. & Reading Coal & Iron Co.* (1916) 217 N. Y. 432, 436-437; *Penn. Fire Ins. Co.* v. *Gold Issue*

main brief (pp. 45-53), the question presented by respondent, having nothing but a paper incorporation in Delaware and its main business situs in the district where sued, is a new one. In deciding that question this Court can give full effect to the facts and hold respondent an inhabitant of the Southern District of New York without modifying anything which has actually been held by this Court.

III.

Contrary to the claims at pages 9, 34 of respondent's brief, petitioners are not in effect contending for a judicial reenactment of the venue statute prior to the 1887 amendment, under which a defendant could be sued wherever he was found. If the doctrine of *Bank of Augusta* v. *Earle* is overruled, and respondent be held, on the plain facts, to be

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Mining & Milling Co. (1917) 243 U. S. 93, 95-96). As so read, this Court has recognized that the filing of a designation may constitute a consent to be sued although in terms merely naming a process agent. In *Mutual Reserve Fund L. Asso.* v. *Phelps* (1903) 190 U. S. 147, 158, this Court said with respect to a Kentucky statute requiring the designation of a process agent:

> "This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims. *Many of those statutes simply provided that the foreign corporations should name some person or persons upon whom service of process could be made.*"

an inhabitant of the Southern District of New York, no question of legislative intent in enacting the 1887 amendment will be presented. Even respondent does not contend that in the 1887 amendment, Congress attempted to legislate with respect to the inhabitancy of corporations. A corporation like respondent, having no real activities or property in its state of origin, and its main business situs in a district of another state, will for venue purposes be deemed a resident of that district as well as of its state of incorporation.[7] If on the other hand that doctrine be maintained

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[7] In England, the rule is even broader, and a corporation having substantial activties in the country of its origin is held to be a resident of Great Britain if it has a permanent office there. See cases cited in petitioners' main brief, note 49 at p. 52. Cf. *Harr* v. *Pioneer Mechanical Corp.* (1933) 65 F. (2d) 332, 334, where the Second Circuit Court of Appeals refused to apply the rule against interfering in the internal affairs of a foreign corporation where the corporation was found to be

> "a Delaware corporation by legal creation, but in every real sense * * * of New York only, where all its business is done, all its property is located and all its records are kept."

Also *Hutchinson* v. *Chase & Gilbert* (1930) 45 F. (2d) 139, 140, where the same court said with respect to the traditional doctrine of personal jurisdiction:

> "Such a theory is not really apposite to a corporation, however conceived, and it is only by analogy that it can be used."

Referring to the real situs of a corporation, the court said (p. 141):

> "It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purpose."

in force and personal jurisdiction over foreign corporations continue to be maintained on the fiction of consent, a consent to be sued elsewhere than in the state of its incorporation must operate as a waiver of the venue defense. Congress did not prevent suit from being brought in any district on waiver of venue restrictions. If it had wished to accomplish that result, it could have restricted the jurisdiction of the courts over the subject-matter. Corporations were not mentioned in the debates on the proposed change in the venue provision in the bills out of which the 1887 amendment developed.[8] Prior to that amendment, Congress had

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[8] In 1880, Mr. Culberson introduced in the 46th Congress H. R. 4219, the main provision of which was to abolish jurisdiction of the subject-matter of diversity suits between foreign corporations doing business in a state and citizens of that state. The provision of this bill regarding the venue of diversity suits was the same as that contained in the Act of Mar. 3, 1887. The venue clause was discussed at 10 Cong. Rec. 700, 703, 814, 820. See also *id.* 1014. The bill passed the House (*id.* 1304-1305) but never emerged from the Senate Judiciary Committee. Similar bills passed the House in the 47th and 48th Congresses (respectively, H. R. 3123, 13 Cong. Rec. 427, 1754, 14 Cong. Rec. 904, 924, 1244-1255 and H. R. 1578, 15 Cong. Rec. 118, 896, 4879, *id.* appendix, 276, 286, 360) and met a similar fate in the Senate. H. R. 2441 in the 49th Congress was another similar bill. It passed the House (18 Cong. Rec. 613-614) and was reported by the Senate Judiciary Committee (*id.* 2168). The Senate adopted the House provision requiring diversity suits to be brought in the district of the residence of the plaintiff or defendant; required other suits to be brought only in the district of the defendant's inhabitance, striking out "or in which he shall be found"; and struck out the provision preventing the exercise of diversity jurisdiction over litigation between a foreign corporation and a citizen

given extensive consideration to curtailing litigation in the federal courts affecting foreign corporations.[9] But the proponents of such proposals sought unsuccessfully, by limiting jurisdiction of the subject-matter, to prevent a foreign corporation doing business in a state from removing suits by citizens thereof to the often distant, expensive and congested federal court, and to prevent such corporations from suing citizens of that state in the federal court on the ground of diversity of citizenship.[10] As the bill finally passed, it did not affect the situation presented by the

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of a state where it did business (*id* 2542-2546) On the report of a conference committee, the House receded and the Senate modification was accepted (*id.* 2651, 2727), the result being the Act of Mar. 3, 1887. Senator Hoar explained the venue change as follows (*id.* 2545):

> "• • • the proposed change in the law is that he can only sue him, they being citizens of different states, either in the defendant's state or if the defendant happens to be in the district of the plaintiff's home then in the plaintiff's district.
>
> "So instead of the sixty or seventy districts which by the existing law the plaintiff can sue him in there are only two left. Suppose the defendant goes to the plaintiff's home and is found there, a man doing business there, the plaintiff can sue him in the state court and the defendant can take him into the United States court. It is certainly reasonable that the plaintiff should be permitted in the first instance to take him into the United States Court."

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[9] See Frankfurter & Landis, "The Business of the Supreme Court," pp. 65, 68-69, 80-81.

[10] 15 Cong. Rec. appendix 287, 362, 363; 10 Cong. Rec. 700, 702, 723, 725, 814, 818, 819, 950, 1015; 14 Cong. Rec. 1245, 1247, 1249, 1251.

Schollenberger case, where citizens of Pennsylvania commenced suit against foreign corporations in a federal court in Pennsylvania. That suit could equally have been maintained under the present venue statute as under the Act of 1875, and the question decided in the *Schollenberger* case was the same question here presented, *viz.*, whether the venue restriction has been waived.

IV.

Respondent's contention (pp. 24, 25, 28, 29) that the New York statute, if interpreted as requiring a consent to be sued in the local courts, federal as well as state, would be unconstitutional under the ruling in the *Denton* case, is, we submit, without foundation. In the *Denton* case this Court held void the requirement of a Texas statute requiring a foreign corporation, as a condition of being permitted to do business in Texas, to agree not to remove any suit against it to a federal court. That holding rested upon the authority of *Home Ins. Co.* v. *Morse* (1874) 21 Wall. 445, and *Barron* v. *Burnside* (1887) 121 U. S. 186, which held a stipulation waiving the right of removal void because it tended to oust the courts of jurisdiction and because it was an attempt by state legislation to deprive the corporation of a right guaranteed to it by the federal constitution (cf. *Terral* v. *Burke Construction Co.* (1922) 257 U. S. 529, 532; *Phillips Petroleum Co.* v. *Jenkins* (1936) 297 U. S. 629, 634).

The present requirement of a waiver of a right to object to being sued in a district outside of the corporation's state of origin does not oust the courts of jurisdiction, but prevents their being ousted of jurisdiction, and does not waive any right given by the constitution. There is no constitutional right not to be sued in a district outside of a corpora-

tion's state of origin. Congress might have authorized the service of process of the federal court in any district (*Toland* v. *Sprague* (1838) 12 Pet. 300, 328-329; *Continental Ill. Nat. Bank & T. Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1935) 294 U. S. 648, 683); and did in fact by the original venue statute authorize defendants to be sued wherever found. The present venue restriction being merely a personal exemption which can be waived, a provision of state law requiring a corporation to waive it as a condition of being admitted to do business in the state, is not, as were the statutes requiring a waiver of the right of removal, "necessarily calculated to curtail the full exercise of the rights thus [by the constitution] secured." (*Terral* v. *Burke Construction Co., supra,* 257 U. S. pp. 532-533).

This Court has repeatedly held that an agreement to submit to the jurisdiction of the local courts is a reasonable and valid condition upon the admission of the corporation to do business in the state (*Ex parte Schollenberger, supra,* 96 U. S., p. 376; *Mutual Reserve Life Fund Asso.* v. *Phelps, supra,* 190 U. S., p. 158; *Washington ex rel. Bond & Goodwin & Tucker* v. *Superior Court* [11] (1933) 289 U. S. 361, 364, 365).

And Congress has shown that where the venue statute would exempt a corporation incorporated and conducting its main business in one state from suit in a federal court in another state where it does some business, the corporation may reasonably be required to waive that exemption

[11] In that case, this Court sustained a judgment based on service on the Secretary of State of Washington, where the defendant corporation had on file a process agent designation, although it had withdrawn from Washington and been dissolved three years before. This Court cited *Bank of Augusta* v. *Earle, Lafayette Ins. Co.* v. *French, St. Clair* v. *Cox,* and *Mutual Reserve Fund L. Asso.* v. *Phelps, supra.*

in advance. § 2 of the Act of Aug. 13, 1894, c. 282, 6 U. S. C. A. 7, requires a surety company incorporated in one state, desiring to give a bond for the completion of a federal improvement in another state, to designate a local process agent, thus waiving the venue defense and consenting to be sued in the district where the bond was given (*U. S.* v. *Sheridan* (C. C. Ky. 1902) 119 Fed. 236).

V.

The decision of the Circuit Court of Appeals should be reversed, and respondent should be held sueable by petitioners in the Southern District of New York.

Respectfully submitted,

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